MAJLIS AGAMA ISLAM NEGERI PULAU PINANG v. ABDUL LATIFF HASSAN (AS ADMINISTRATOR OF ESTATES OF HJ MOHAMMAD HJ ABDUL RASID; DECEASED) & ANOR

HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[CIVIL SUIT NO: 21NCVC-13-06-2014]
15 OCTOBER 2015

CIVIL PROCEDURE: *Striking out – Application for – Writ and statement of claim – Rules of Court 2012, O. 18 r. 19(1) – Land matter – Whether there were triable issues – Whether writ and statement of claim ought to be struck off*

CONSTITUTIONAL LAW: *Courts – Jurisdiction – Wakaf land – Whether civil court has jurisdiction to hear cases concerning wakaf land – Whether civil court trespassed into civil jurisdiction of Syariah Court – Whether civil court could grant reliefs to aggrieved party*

LAND LAW: *Wakaf land – Validity of – Claim on wakaf land – Rightful owner – Indefeasibility of title accorded by s. 340(3)(b) of the National Land Code – Whether applied to wakaf land – Whether civil courts has jurisdiction to hear cases concerning wakaf land – Whether civil court trespassed into civil jurisdiction of Syariah Court*

LIMITATION: *Land – Recovery of – Claim on wakaf land – Allegation that wakaf created 100 years ago – Whether action statute-barred*

The first defendant, the administrator of the estate of one Hj Mohammad, entered into a sale and purchase agreement with the second defendant, as purchaser of the land for the purchase price of RM11,112,720.46. The second defendant paid 10% of the purchase price and entered a caveat on the said land. However, the plaintiff averred that the said land was wakaf land, as proven by a deed poll. According to the plaintiff, based on the deed poll, the indenture and provisions of ss. 89 and 90 of the Administration of the Religion of Islam (State of Penang) Enactment 2004 ('the Enactment'), the plaintiff had ownership or proprietary interest on the land. Hence, any other name stated in the issue document of title had to be cancelled and/or set aside. In the High Court, the plaintiff sought for, *inter alia*, (i) the removal of the second defendant's private caveat; (ii) the cancellation of the first/second defendant's name from the issue document title of the land; (iii) a declaration that the transfer of the land between the defendants (if any) shall be nullified and set aside. In denying the plaintiff's allegations, the first defendant argued that (i) the civil court lacked jurisdiction to hear Syariah issues on wakaf and the Syariah Court must first determine the issue of wakaf before the plaintiff could file a claim in the civil court; (ii) the plaintiff's claim was barred by limitation as the wakaf was created more than 100 years ago; and (iii) the first defendant had an indefeasible title over the land by virtue of s. 340 of the National Land Code ('NLC'). In the present

A application, the first defendant sought to strike out the plaintiff's writ and amended statement of claim, pursuant to O. 18 r. 19(1)(a), (b), (c) or (d) of the Rules of Court 2012 ('ROC').

Held (dismissing application):

B **(1)** There was no issue of the civil court trespassing into the civil jurisdiction of the Syariah Court on wakaf matters. The ruling that the land was wakaf land had been determined by the Fatwa Committee pursuant to s. 47 of the Enactment based on the deed poll and indenture and a fatwa to the effect had been issued. The said fatwa is an Islamic edict that has to be obeyed by the first defendant who is a Muslim. Hence, with the fatwa ruling, this court implemented the said ruling that the land was wakaf land and gave necessary reliefs that the plaintiff was asking which were within the civil jurisdiction of the High Court. Furthermore, the other substantive issues and reliefs raised and sought for by the plaintiff were within the exclusive jurisdiction of the High Court. (paras 17 & 18)

(2) The issue of limitation involves a serious interpretation of the law and assessment of the facts and circumstances of the case in order to determine whether limitation applied in the present case. This was a triable issue which could not be summarily disposed of by a striking out application. (para 23)

(3) By virtue of s. 4(2)(e) of the NLC, the first defendant could not rely on s. 340 of the NLC to allege indefeasibility of title in respect of the registered or beneficial ownership of the land. Indefeasibility of title protection accorded by the proviso to s. 340(3)(b) of the NLC did not apply to wakaf land. (para 24)

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

G *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77 SC* ***(refd)***

Latifah Mat Zin v. Rosmawati Sharibun & Anor [2007] 5 CLJ 253 FC ***(refd)***

Majlis Agama Islam Pulau Pinang & Seberang Perai v. Katijah Yoan & Ors [2010] 4 CLJ 592 HC ***(refd)***

H *Majlis Ugama Islam Pulau Pinang Dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors [2003] 3 CLJ 289 FC* ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (State of Penang) Enactment 2004, ss. 4, 47, 61(3), 89, 90

Federal Constitution, art. 121(1), (1A)

I Limitation Act 1953, ss. 6, 9, 29

National Land Code, ss. 4(2)(e), 340(3)(b)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff - Mohamed Aslam Mohamed Mydin; M/s Presgrave & Matthews
For the 1st defendant - Fahda Nur Ahmad Kamar (Mohd Yusmadi Yusoff with her); M/s Fahda Nur Yusmadi & Co

Reported by Najib Tamby

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] The plaintiff is a body established under s. 4, of the Administration of the Religion of Islam (State of Penang) Enactment 2004. The first defendant is the administrator of the estate of Hj Mohammad bin Hj Abdul Rasid (the deceased) by a grant of letters of administration dated 4 September 2012 from the High Court of Malaya in Penang. The subject matter in dispute is a piece of land Lot No. 791, Mukim 11, Geran Mukim No. 457, Bayan Lepas, Daerah Barat Daya, Pulau Pinang which is the asset of the estate of Hj Mohammad bin Hj Abdul Rasid (deceased). This piece of land was formerly known as Lot 391 [1] Mk 11 Daerah Barat Daya, Pulau Pinang. There was a transfer from Haji Mohamed bin Hajee Abdul Rasheed to Hj Mohammad bin Hj Abdul Rashid on 12 April 2013.

[2] Thereafter there was a transmission of ownership from the deceased to the first defendant on 12 April 2013. By an order dated 9 April 2013, the High Court of Malaya in Penang granted permission to the first defendant to sell and transfer the ownership of the said land to the second defendant.

[3] The first defendant (as vendor) had entered into a sale and purchase agreement with the second defendant (as purchaser) on 7 March 2013 for RM11,112,720.46 purchase price. The second defendant had paid 10% of the purchase price and had entered a caveat on the said land.

[4] In April 2014, the plaintiff was informed that the said land is wakaf land which is proven by a deed poll dated 6 September 1982 vol. CCV11 p. 435 No. 145 whereby the pertinent excerpts read:

> "[Made between Hajee Driss bin Shaikoo and Saibah Bintee Noohmin and Hajee Abdul Rasheed] ... For the consideration of the sum of one dollar, do assign ... onto Hajee Abdul Rasheed in trust all that piece of land and hereditaments situate in the District of Bayan Lepas in Penang bearing part of grant No. 2421 ... to hold the said piece of land and every part and parcel thereof ... belonging unto the said Hajee Abdul Rasheed tersebut, his heirs and assigns in trust for the purposes of a mosque or place of public worship and burial ground for the Mohamedan community of the village of Bayan Lepas in Penang forever" and an indenture/ conveyance dated 5.6.1908, whereby the pertinent excerpts read:
>
> > Made Saheemah Binte Haji Abdul Karim (widow of Hajee Abdul Rashid) and Hajee Mohamed Bin Hajee Abdul Rasheed ... [at the

A penultimate paragraph of the 'conveyance'], "subject to the provision of a Deed Poll dated 6.9.1882 and made by the said Hajee Driss and his wife Saibal to the said Hajee Abdul Rasheed for the purpose of a mosque".

[5] The plaintiff's contention is that from both the deed poll and
B indenture, it is clear that land is a wakaf land and as such it cannot be sold, given as a gift nor inherited by anyone except and in so far as it involves the plaintiff.

[6] The reasons being the plaintiff was established under s. 4 of the '2004 Enactment' where under s. 89 of the 2004 Enactment provides, *inter alia,* that
C notwithstanding and provision to the contrary contained in any instrument or declaration creating, governing or affecting it, the Majlis (plaintiff) shall be the sole trustee of all wakaf in the state of Penang. Furthermore, by virtue of s. 90 of the 2004 Enactment, it provides, *inter alia,* that all property subject to s. 89 shall without any conveyance, assignment or transfer and, in the case
D of immovable property, upon registration under the written law relating to land, vest in the Majlis (plaintiff) affecting the property.

[7] According to the plaintiff, based on the deed pool, the Indenture and provisions of ss. 89 and 90 of the 2004 Enactment, the plaintiff has ownership or proprietary interest on the land which is wakaf land, whereby
E the same should be registered and vested in the plaintiff. Hence, accordingly any other name stated in the issue document of title has to be cancelled and or set aside.

[8] It is not disputed that the deed poll and the Indenture referring to the land are genuine documents and duly registered at the Settlement of Penang,
F Registry of Deeds. Land title searches conducted on 20 May 2014 and 4 June 2014 by the plaintiff's solicitors at the Pejabat Pengarah Tanah dan Galian Negeri Pulau Pinang and also at the Pejabat Daerah dan Tanah Daerah Barat Daya, Balik Pulau, Pulau Pinang confirmed the existence of the deed poll and the indenture.

G **[9]** The status of the land as wakaf land was further affirmed by a letter dated 13 June 2014 from Jabatan Mufti Negeri Pulau Pinang informing the plaintiff that the Mesyuarat Jawatankuasa Fatwa Negeri Pulau Pinang Bil 3/2014 dated 21 May 2014 and 22 May 2014 had made a fatwa finding which held that the land is a wakaf land based on the deed poll and the
H Indenture. Accordingly, as such the sale and purchase of the wakaf land is not valid according to Islamic law (hukum syarak).

[10] Based on the foregoings, the plaintiff in its amended statement of claim against the defendants seeks for:

I (a) Declaration and order that the land is vested in the plaintiff and that the

plaintiff is to be registered as owner thereof;

(b) Declaration and order that the transmission of title of the said land registered on 12 April 2013 from the deceased's name to the first defendant's name pursuant to Geran Mengenai Surat Kuasa Pentadbir dated 4 September 2012 is void, ineffective and be set aside;

(c) Order dated 9 April 2013 in the originating summons proceedings be struck out and be set aside;

(d) The sale and purchase agreement dated 7 March 2014 be annulled and set aside;

(e) The power of attorney dated 7 March 2014 be annulled and set aside;

(f) The second defendant's private caveat registered on 12 April 2013 be removed/cancelled;

(g) The first defendant (or the second defendant)'s name shall be cancelled from the document title of the said land and substituted with the plaintiff's name;

(h) Any transfer of the said land between the defendants (if any) shall be nullified and set aside;

(i) Any expenses payable for the purpose abovestated shall be borne by each of the defendants;

(j) An order that the relevant Pendaftar Hakmilik Tanah or Pendaftar shall carry out and take all the necessary actions and steps (including to rectify the issue and register document of title of the said land) to fully give effect to the orders obtained herein; and

(k) An order that the defendants shall pay the plaintiff damages (to be assessed), interest and costs.

[11] The main thrust of the first defendant's defence is that the plaintiff's claim is barred by limitation, that the said land is not wakaf land and that he has an indefeasible title over the land by virtue of s. 340 National Land Code. The first defendant also includes a counterclaim claiming damages as a result of the plaintiff's negligence for not registering the wakaf on the said land. The second defendant's defence is that it has no knowledge that the said land is wakaf land when the sale and purchase agreement was entered into.

[12] The first defendant applies to strike out the plaintiff's writ of summons dated 13 June 2014 and amended statement of claim dated 23 June 2014 under O. 18 r. 19(1)(a), (b), (c) or (d) Rules of Court 2012.

[13] Between the first defendant and the plaintiff, there are altogether 12 affidavits filed in support and contest the said application. The parties have also filed in their written submissions. After having read all the

A affidavits and considered the written submissions, my findings are stated below.

Findings

[14] The first defendant raised the issue that a civil court lacks jurisdiction
B to hear syariah issues on wakaf and that the Syariah Court must first determine the issue of wakaf before the plaintiff can file a claim in a civil court. This is in connection with the plaintiff's amended statement of claim which claims for, *inter alia*, a declaration that the land belongs to the plaintiff because it is a wakaf land.

C **[15]** The first defendant relies on art. 121(1) and (1A) of the Federal Constitution on the jurisdiction of the High Court with the exception of (1A) where "the courts referred to in cl. (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts". On the jurisdiction of the Syariah Courts, s. 61(3) Administration of the Religion of
D Islam (State of Penang) Enactment 2004 applies:

> The Syariah High Court shall - (b) in its civil jurisdiction, hear and determine all actions and proceedings, if all the parties to the actions or proceedings are muslims and the actions or proceedings relate to … (vii) wakaf or nazr.

E **[16]** The first defendant relies on the cases of *Latifah Mat Zin v. Rosmawati Sharibun & Anor* [2007] 5 CLJ 253; [2007] 5 MLJ 101 which held that "if in a case in the civil court, an Islamic law issue arises, which is within the jurisdiction of the Syariah Court, the party raising the issue should file a case in the Syariah Court solely for the determination of that issue and the
F decision of the Syariah Court on that issue should such be applied by the civil court in the determination of the case".

[17] In *Majlis Ugama Islam Pulau Pinang dan Seberang Perai v. Shaik Zolkaffily Shaik Natar & Ors* [2003] 3 CLJ 289, the court took the 'subject matter' approach rather than the 'remedy prayed for' approach, which was adopted
G and applied in *Latifah Mat Zin*'s case. Being decisions of the Federal Court, these two decisions are of the highest authority of which I am bound by its ruling. However, in this present case, the ruling that this land is wakaf land has been determined by the Fatwa Committee pursuant to s. 47 of the 2004 Enactment based on the deed poll and indenture and a fatwa to the effect had
H been issued. The said fatwa is an Islamic edict that has to be obeyed by the first defendant who is a Muslim. Hence, with the fatwa ruling, this court will be merely implementing the said ruling that the land is wakaf land and gives the necessary reliefs that the plaintiff is asking which are within the civil jurisdiction of the High Court Malaya. There is therefore, no issue of this
I court trespassing into the civil jurisdiction of the Syariah Court on wakaf matters.

[18] In the event that the first defendant is unhappy with the fatwa ruling, which is the case here, the first defendant should challenge it in the Syariah High Court and not the other way around that is to force or insist that the plaintiff files a suit and seeks a decision from the Syariah High Court before coming to the High Court here. For the plaintiff, the fatwa ruling is in their favour and up to the date this decision was made, the defendant has not gone to the Syariah High Court to challenge the fatwa ruling. If the first defendant is so keen to dispute the said fatwa ruling, he should be the first person to seek his remedy there. Hence, there is no issue of jurisdiction here as the subject matter ie wakaf land has been determined by the said fatwa and what remains in this court is to decide and determine the other substantive issues and reliefs raised and sought for in the plaintiff's amended statement of claim which is within the exclusive jurisdiction of the High Court. See *Dalip Kaur Gurbux Singh v. Pegawai Polis Daerah (OCPD), Bukit Mertajam & Anor* [1991] 3 CLJ 2768; [1991] 1 CLJ (Rep) 77; [1992] 1 MLJ 1 where the Supreme Court remitted the case to the High Court and directed a fatwa be obtained. Hence, this court can rely on the said fatwa which has determined that the said land is wakaf land.

[19] The first defendant raised the issue that the plaintiff was barred by limitation as the alleged wakaf was created more than 100 years ago and by 2014 it is already too late in the day for the plaintiff to file this suit. The plaintiff claimed that the wakaf status of the land was only discovered by them in 2014 when they were first informed of it by one first defendant's counsel. A subsequent land search made by the plaintiff in 2014 confirmed the existence and genuiness of the deed poll and the indenture.

[20] Hence, according to the plaintiff, the suit was filed within 2½ month from the initial date they came to know about the existence of wakaf on the land and hence, the limitation period under s. 6 (six years) nor s. 9 (12 years) Limitation Act 1953 will not expire so as to extinguish the plaintiff's rights to their claim.

[21] Next, the plaintiff pleaded particulars of fraud, forgery, insufficient or void instrument and negligence committed by the first defendant whereby the limitation period for an action on fraud will not begin to run until the plaintiff has discovered the fraud (s. 29 Limitation Act 1953).

[22] Furthermore, the plaintiff's contention that their interest and rights in the said land is statutory in nature due to ss. 89 and 90 of the 2004 Enactment. Hence, any allegations of delays, laches, estoppel or waiver cannot defeat the operation of such statutory provisions (see *Majlis Agama Islam Pulau Pinang & Seberang Perai v. Katijah Yoan & Ors* [2010] 4 CLJ 592).

[23] It is my considered view that the issue of limitation involves a serious interpretation of the law and assessment of the facts and circumstances of the

A case in order to determine whether limitation applies in the present case. This is a triable issue which cannot be summarily disposed of by a striking out application.

[24] The first defendant claimed that he enjoys the indefeasibility of title under s. 340 of the National Land Code. I agree with the submission of the B plaintiff that by virtue of s. 4(2)(e) National Land Code, the first defendant cannot rely on s. 340 NLC to allege indefeasibility of title in respect of the registered or beneficial ownership of the said land. See *Majlis Agama Islam Pulau Pinang & Seberang Perai v. Katijah Yoan & Ors* [2010] 4 CLJ 592 where it held that the indefeasibility of title protection accorded by the proviso to C s. 340(3)(b) of the National Land Code did not apply to wakaf land.

Conclusion

[25] Based on the above stated reasons, this is not a plain and obvious case that recourse should be had to the summary process of striking out the D plaintiff's writ and amended statement of claim under O.18 r. 19(1)(a), (b), (c) or (d) ROC. See *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7. I therefore dismissed the application with cost of RM4,000.

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